IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-880

DT. SGT. THOMAS D. LOWTHER; DT. SGT. THOMAS D. LOWTHER, PRESIDENT, POLICE ASSOCIATION OF MONTGOMERY COUNTY, MARYLAND, INC., A MARYLAND CORPORATION

and

MONTGOMERY COUNTY, MARYLAND, A MUNICIPAL CORPORATION

Petitioners,

v.

STATE OF MARYLAND EMPLOYEES RETIREMENT SYSTEM, DIVISION OF SOCIAL SECURITY, MILDRED POTASH, ADMINISTRATOR

and

F. DAVID MATTHEWS, SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE

and

ROBERT M. BALL, COMMISSIONER OF SOCIAL SECURITY AND THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE

Respondents.

---

## PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS

---

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IN THE
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DT. SGT. THOMAS D. LOWTHER; DT. SGT. THOMAS D. LOWTHER, PRESIDENT, POLICE ASSOCIATION OF MONTGOMERY COUNTY, MARYLAND, INC., A MARYLAND CORPORATION

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

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DT. SGT. THOMAS D. LOWTHER; DT. SGT. THOMAS D. LOWTHER, PRESIDENT, POLICE ASSOCIATION OF MONTGOMERY COUNTY, MARYLAND, INC., A MARYLAND CORPORATION

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
FOURTH CIRCUIT COURT OF APPEALS

The Petitioners, DT. SGT. THOMAS D. LOWTHER, individually and as PRESIDENT of the POLICE ASSOCIATION OF MONTGOMERY COUNTY,

MARYLAND, INC., A MARYLAND CORPORATION and MONTGOMERY COUNTY, MARYLAND, A MUNICIPAL CORPORATION, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Fourth Circuit Court of Appeals entered in this proceeding September 20, 1977.

## OPINION BELOW

The opinion of the Fourth Circuit Court of Appeals is reported in 561 Federal Reporter, 2d, pages 1120-1123, a copy of that opinion is printed in the Appendix.

## JURISDICTION

The judgment and opinion of the Fourth Circuit Court of Appeals was



entered September 20, 1977. The Fourth Circuit Court of Appeals entered an order vacating the judgment of the District Court on the merits and remanding the case to that Court with instructions to dismiss the complaint for lack of jurisdiction. This Petition was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254(1).

## QUESTIONS PRESENTED

1. Were the jurisdictional requirements of Title 42 U.S.C. 405(g) as interpreted by this court in Weinberger v. Salfi in 422 U.S. 749 (1975) satisfied when the Social Security Retirement System Coverage Group of Montgomery County Policemen

requested termination of coverage for all its members including the Petitioner Lowther pursuant to the provisions of Title 42 U.S.C., Section 418(g)(1)(B)?

2. Were the jurisdictional requirements of Title 42 U.S.C., Section 418(g)(1)(B) met when no appeal was taken by the Respondents to factual findings of the District Judge that a proper request by the State of Maryland had been made for termination of coverage for the Social Security Retirement System Coverage Group known as the Montgomery County Policemen?

3. Were the formality requirements, if any, of Title 42 U.S.C., Section 418(g)(1)(B) satisfied by making the State of Maryland a party to this litigation when evidence demonstrated



and the District Judge found no formality requirements existed and as Petitioners argue that the State of Maryland in its role prescribed by Title 42 U.S.C., Section 418(g)(1)(B) acted with an arguable conflict of interest to avoid a class action suit by the Petitioners?

4. Was the "final decision" requirement of 405(g) as interpreted by this Court in Weinberger V. Salfi, 422 U.S. 749 (1975) satisfied in this case when the findings of fact by the District Judge adopted by the Circuit Panel clearly indicate the nonexistence of any administrative procedure for termination request under 418(g)(1)(B) and the record clearly establishes both Petitioners and Respondents as adversaries while represented by counsel,

argued their respective positions before opinions were rendered, at first by the Regional Commissioner of Social Security and later by the Commissioner himself in the form of a written opinion?

## STATUTORY PROVISIONS INVOLVED

1. Title 42 U.S.C., Section 405 (g); a copy of this provision is printed in the Appendix.

2. Title 42 U.S.C., Section 418 (g)(1)(B):

> (g) Termination of agreement. (1) Upon giving at least two years' advance notice in writing to the Secretary of Health, Education and Welfare, a State may terminate, effective at the end of a calendar quarter specified in the notice, its agreement



> with the Secretary either--
>
> (A)--
>
> (B) With respect to any coverage group designated by the State, but only if the agreement has been in effect with respect to such coverage group for not less than five years prior to Receipt of such notice.

3. Title 42 U.S.C., Section 418 (d)(3) in its entirety; a copy of this provision is printed in the Appendix.

## STATEMENT OF THE CASE

These two cases raise questions concerning statutory provisions which extend coverage of the Social Security Act to state and local employees. By

order of the District Court, both cases were consolidated for all purposes pursuant to Rule 42(a) of the Federal Rules of Civil Procedure and by consent of all parties a judicial determination of all issues would be applicable to all present and former policemen.

In Civil No. 73-661-H, Montgomery County, Maryland sued on behalf of its police officers, the coverage group seeking termination of coverage under Title 42 U.S.C., Section 418(g)(1)(B), while in Civil No. H-74-530, Dt. Sgt. Thomas Lowther, individually as a member of the coverage group and in his role as President of the Police Association of Montgomery County sued on behalf of the police officers for the coverage group seeking termination. In the Consolidated Amended Bill of Complaint, Petitioners assert jurisdictional basis in the District Court pursuant to 28



U.S.C., Section 1331(a); 28 U.S.C., Section 2281, 2282-2284; 42 U.S.C. 405(g); Title 5 U.S.C, Section 703; Title 28 U.S.C., Section 1361. The District Court found jurisdiction in 28 U.S.C., Section 1331(a), 42 U.S.C. 405(g), 5 U.S.C., 701 et seq.

The consolidated Amended Complaint sought a declaration that the policemen for Montgomery County entered the Social Security Program as a separate absolute coverage group and as such are capable of terminating their coverage under the provisions of 418(g)(1)(B); that the policemen for Montgomery County terminated coverage under Title 42 U.S.C., Section 418(g)(1)(B) on or before July 22, 1971, effective date of termination under the Act being June 30, 1973; that the Court declare the referendum held on April 5, 1965 invalid as not complying with Title 42 U.S.C.,

Section 418(d)(3)(E); that the Court enjoin Montgomery County from withholding funds from bi-weekly pay checks for Social Security contributions; that the Court award costs and counsel fees to the Petitioners. Named as defendants in this action were the Commissioner of Social Security, Secretary of the Department of Health, Education and Welfare; and the Employees Retirement System of the State of Maryland.

Title 42 U.S.C., Section 418(a) authorizes the Secretary to enter into an agreement with any state for the purposes of extending social security coverage to state and local governmental employees. After such an agreement has been in effect for five years, the state pursuant to Section 418(g)(1)(B) may terminate that agreement "with respect to any coverage group designated by the state" by giving written notice



two years in advance of termination.

In 1951, the State of Maryland and the Secretary's predecessor, the Federal Security Administrator, executed an agreement under Section 418(a) "for the purpose of extending the old age and survivors' insurance system established by Title II of the Social Security Act.. to services performed by individuals employed by political subdivisions of the State of Maryland." By 1958, this coverage included all employees of Montgomery County except police officers and elected officials. Subsequent enabling legislation provided for coverage group status of policemen. The policemen of Montgomery County had a separate retirement system. The passage of Section 418(d)(3) permitted the extension of coverage to governmental employees covered by a retirement system

provided that a referendum is held and a majority of the eligible employees vote in favor of such coverage.

On April 5, 1965, Montgomery County Police Officers held such vote in favor of being included within the outstanding agreement with the State of Maryland. The Chief of the Division of Social Security, Board of Trustees of the Employees retirement System of the State of Maryland, who is the state official empowered to seek modification of the agreement with the Secretary was notified by Montgomery County of the favorable vote but never certified these results to the Secretary of Health, Education and Welfare as required by Title 42 U.S.C., Section 418(d)(3). No agreement or modification of the original federal-state agreement extending the insurance system established by the



Title to the Police Retirement System was executed within two years of the vote as required by Title 42 U.S.C., Section 418(d)(3)(E).

On April 2, 1971, approximately six years after the coverage in question had become effective, Montgomery County Policemen conducted another vote and on this occasion voted to withdraw from social security coverage. The Montgomery County Council formally notified the State Administrative Officer of the County's desire to terminate social security coverage for its policemen pursuant to Section 418(g)(1). This request was referred to the Regional Commissioner for Social Security Administration. This request was denied. A further request in the form of an "appeal" was made to the Commissioner. On February 2, 1973, the Commissioner of

Social Security took action which in effect denied the State's appeal and affirmed the previous determination that the relevant coverage group for the purposes of terminating coverage was composed of all employees of Montgomery County and not merely policemen. This action was thereafter filed. Finding the Petitioners had standing and the Court had jurisdiction to hear the case under Title 42 U.S.C., Section 405(g); Title 28 U.S.C., Section 1331(a); and Title 5 U.S.C., Section 701, et seq., the District Court nonetheless ruled in favor of the Respondents on the following issues:

(a) Whether the original referendum was valid.

(b) Whether the Respondent was estopped to deny coverage under the principle of Federal Crop Insurance



Corporation v. Merrill, 332 U.S., 380 (1947).

(c) Whether an interpretation of the provisions of Title 42 U.S.C., Section 418 et seq. entitles the retirement system coverage group, Montgomery County Police, to terminate coverage pursuant to Title 42 U.S.C., Section 418(g)(1)(B).

(d) Whether Title 42 U.S.C., Section 418(g)(1)(B) in form or application to the facts of this case is unconstitutional.

An appeal was taken to the Fourth Circuit Court of Appeals by the Petitioners on those merit issues decided by the Court and the same were argued before the panel on October 7, 1976. No appeal was taken by either Respondents.

By written published opinion, the

Court of Appeals for the Fourth Circuit vacated the judgments of the District Court on the merits, and ordered a remand of the case to the District Court with instructions to dismiss the complaint for lack of subject matter jurisdiction.

## REASONS FOR GRANTING THE WRIT

### I.

### THE LOWER COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

The Petitioners suggest that Title 42 U.S.C., Section 418(g)(1)(B) allows the retirement system coverage group to file a request for termination of coverage on behalf of all its members, one of which was the Petitioner. When this is done, the "individual" claim requirement of Title 42 U.S.C., Section 405(g)



has been met.

Since jurisdiction in the Federal District Court for claims under the Social Security Act lies squarely in Title 42 U.S.C., Section 405(g), this Court should decide whether the statutory requests for termination of coverage benefits for coverage groups on behalf of their individual members meet the "individual claim" requirement of Section 405(g).

### II.

### THE LOWER COURT HAS RENDERED A DECISION ON A FEDERAL QUESTION IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The record, supported by the findings of the District Judge, to which no appeal was taken establishes no administrative review provisions existed for coverage group recipients of adverse

decisions to Title 42 U.S.C., Section 418(g)(1)(B) termination request. The record further reflects Petitioners and Respondents were represented as adversaries by their own counsel during that prelitigation phase when the documented requests for termination with written reasons in support thereof were denied. The Petitioners assert that the written opinion of the Commissioner denying relief constitutes a "final decision" under the principles of this Court in Weinberger v. Salfi, 422 U.S. 749 (1975) and Matthews v. Eldridge 424 U.S. 319 (1976).

THE LOWER COURT'S RULING ON THE FORMALITY REQUIREMENTS OF THE STATE OF MARYLAND'S REQUEST FOR TERMINATION PURSUANT TO TITLE 42 U.S.C., SECTION 418(g)(1)(B) IS A DECISION NOT PREVIOUSLY RULED UPON BY THIS COURT AS A JURISDICTIONAL PREDICATE FOR FILING SUIT IN THE FEDERAL DISTRICT COURTS. INSOFAR AS THE COURTS RULING IS INCONSISTENT WITH THE



FINDINGS OF FACT OF THE DISTRICT JUDGE TO WHICH NO APPEAL WAS TAKEN BY RESPONDENTS, IT IS A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

The Petitioners suggest this Court should rule on the formality requirements of the State's request for termination pursuant to Title 42 U.S.C., Section 418(g)(1)(B). The record is clear and the District Judge found as fact no formal requirements had been established by the Secretary.

Confronted with the merit arguments stated under Title 42 U.S.C., Section 418(d)(3) in its entirety, the State of Maryland did everything possible to facilitate the policemen's request for termination. For purposes of litigation, the District Court ruled in response to the Federal Respondent's Motion to Dismiss, that the formal party requirement was satisfied by making the State

of Maryland a party defendant.

## CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment of the Fourth Circuit Court of Appeals.

Respectfully submitted,

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# APPENDIX

**APPENDIX**

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United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 76-1229

Dt. Sgt. Thomas D. Lowther;
Dt. Sgt. Thomas D. Lowther,
President, Police Association
of Montgomery County, Maryland,
Inc., a Maryland Corporation,

Appellant,

versus

Montgomery County, Maryland, a
municipal corporation, State of
Maryland, Employees Retirement
System Division of Social Security,
Mildred Potash, Administrator,
James Caldwell, Commissioner of
Social Security and F. David Mathews,
Secretary of the Department of
Health, Education and Welfare,

Appellees.

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No. 76-1230

Montgomery County, Maryland, a
Municipal Corporation,

Appellant,

versus

Robert M. Ball, Commissioner of Social Security and the Department of Health, Education and Welfare, and State of Maryland

Appellees.



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Appeal from the United States District Court for the District of Maryland, at Baltimore. Alexander Harvey, II, District Judge.

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Argues October 7, 1976
Decided Sept. 20,1977

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Before HAYNSWORTH, Chief Judge, BUTZNER and WIDENER, Circuit Judges

---

Peter I. J. Davis for Appellant Dt. Sgt. Thomas D. Lowther (Richard S. McKernon, County Attorney for Montgomery County, Alfred H. Carter, Deputy County Attorney for Montgomery County, Martin J. Hutt, Assistant County Attorney for Montgomery County on brief) for Appellant Montgomery County, Maryland. James F. Truitt, Jr., Assistant Attorney General (Francis B. Burch, Attorney General on brief) for Appellee; Henry Eigles, Attorney, Office of General Counsel, Department of Health, Education and Welfare (Jervis Finney, United States Attorney and Donald H. Feige, Assistant United States Attorney on brief) for Appellee.

HAYNSWORTH, Chief Judge:

The policemen of Montgomery County, Maryland sought to terminate their social security coverage, and brought this action to obtain (1) a determination that they constitute a separate "coverage group" for the purpose of such termination and (2) an injunction to require the Social Security Administration to terminate their coverage retroactively. Since no plaintiff is an individual who has presented a claim challenging his coverage to the Secretary or his delegate, we conclude there is no jurisdiction under 42 U.S.C.A. 405(g). Since the State of Maryland has not officially challenged the Secretary's conclusion that the policemen are not a separate coverage group, there is no jurisdiction under



42 U.S.C.A. 418. Hence, we conclude that there is no subject matter jurisdiction of this controversy.

In 1971, the policemen of Montgomery County voted to terminate their social security coverage. The Montgomery County Council adopted a resolution notifying the Chief of the Social Security Division of Maryland's Employment Retirement System that the policemen wished to discontinue their social security coverage on June 30, 1973. The resolution, however, disclaimed any approval or disapproval by the County Council of the policemen's request.

The State administrative office sought the advice of the Regional Commissioner of Social Security who expressed the opinion that while all of the employees of Montgomery County could

withdraw from the program, the policemen, alone, could not. After further informal meetings, the County Personnel Director sent a letter denominated an "appeal" to the state Social Security Administrator, who forwarded it to the Social Security Administration. The Commissioner of Social Security sent the state Social Security Administrator a report containing a ruling, in agreement with the earlier opinion of the Regional Commissioner, that the Montgomery County policemen alone could not withdraw from the program.

Thereafter, plaintiff Lowther, Individually and as President of the Montgomery County Police Association, and Montgomery County filed this action.

Though subsequently holding against the plaintiffs on the merits, the



district court found jurisdiction under 28 U.S.C.A. 1331. Resting jurisdiction upon§1331, it concluded, was not precluded by 42 U.S.C.A. 405 (h), since it found no provision in the Social Security Act for a hearing and administrative review of a group's claim of a right of termination.

After the district court's ruling on jurisdiction, the Supreme Court's opinions in Weinberger v. Salfi, 422 U.S. 749 (1975) and Mathews v. Eldridge, 424 U.S. 319 (1976) were announced. Salfi was a class action attacking certain duration-of-relationship social security eligibility requirements as unconstitutional. The district court in Salfi had looked upon § 405(h) as only a codification of the exhaustion requirement presenting no barrier to the exercise of federal

question jurisdiction under 28 U.S.C.A. 1331. The Supreme Court disagreed, holding that 42 U.S.C.A. 405(h) was an absolute bar to the exercise of jurisdiction under § 1331 of any claim arising under Title II of the Social Security Act.

Because of the intervening decisions in the Supreme Court, at oral argument the plaintiffs conceded that jurisdiction could not be founded upon § 1331. Instead, they assert jurisdiction under 42 U.S.C.A. 405(g) which provides that "any individual, after any final decision of the Secretary made after a hearing to which he was a party, *** "may obtain review of the Secretary's decision by a civil action timely filed. They look to language in Mathews v. Eldridge, supra, in which it was said that the requirement of a final



decision by the Secretary in 405(g) consisted of two elements. One of the elements is that administrative remedies be exhausted, a requirement that could be waived by the Secretary. The other element, however, is strictly jurisdictional. It is that a claim shall have been presented to the Secretary, for in the absence of a claim properly presented, there could be no "decision." Thus there can be no judicial review under § 405(g) by a plaintiff who has filed no claim.

The plaintiffs would avoid the jurisdictional claim requirement of § 405(g), since in this case the Commissioner has actually ruled upon the plaintiffs' contention that they constitute a separate coverage group. It is true that there has been, at least, an informal ruling by the Commissioner, but

that does not avoid the jurisdictional problem because § 405(g) authorizes judicial review only when sought by an "individual" after a final decision by the Secretary made after a hearing to which the individual was a party. Montgomery County, one of the plaintiffs, is not such an individual, and Lowther, the only individual plaintiff, filed no claim and has not been a party to any hearing. Nor is his position enhanced by representation of the Police Association, for the Association is not an individual entitled to review.

Lowther may present his contention by seeking a review of his social security wage records under § 405(c), and any adverse determination by the Secretary would be open to judicial review under § 405(g). There is no indication that he has done that or, by any



other means, presented his claim or contention to the Secretary or his delegate. Officials of the county and state have presented the policemen's desire to withdraw from the social security system to officials of the Social Security Administration, but Salfi, supra, and Eldridge, supra, make it quite clear that only individuals who themselves have presented their claims to the Secretary are entitled to judicial review under § 405(g). Salfi was a purported class action. The named plaintiffs had presented their claims to the Secretary and the Secretary had denied them, but the Supreme Court held there was no jurisdiction to consider the class claims, for there was no allegation that the unnamed members of the class had ever filed applications with the Secretary for the benefits they sought.

There may be a degree of futility in a requirement that judicial consideration be postponed to a final decision by the Secretary after a hearing upon a claim asserted by an individual policeman. If further administrative proceedings were futile beyond all question, exercise of judicial jurisdiction would still be foreclosed. There was such a suggestion in Salfi, but the Supreme Court said that the "final decision" requirement of 405(g) is:

> something more than simply a codification of the judicially developed doctrine of exhaustion, and may not be dispensed with merely by a judicial conclusion of futility.

In this instance, however, futility may not be obvious. The question has not been presented to the Secretary in an adversary proceeding. In an informal way, representatives of the Social



Security Administration have been informed of the wishes of the policemen, but there has been no hearing; no evidence has been presented and no advocate for the policemen has argued their case before a hearing officer. Nor has there been any presentation of their position by an advocate in their behalf to any reviewing authority. Perhaps, when administrative remedies are pursued, the Secretary will come to the same conclusion, but that will remain uncertain until the necessary administrative proceedings are completed.

Under 42 U.S.C.A. 418(t) Maryland itself may prosecute the claim of the policemen through the claim and review procedures of the Social Security Administration and may seek judicial review of an adverse decision under 418(s). Maryland, however, has prosecuted no such administrative proceedings and is not a

party to this judicial proceeding. Hence, we have no jurisdiction under 418(s).

Finally, jurisdiction cannot be rested upon 10 of the Administrative Procedure Act, 5 U.S.C.A. 701, et seq. because the Supreme Court has recently held that the Administrative Procedure Act is not an independent grant of subject matter jurisdiction. Califano v. Sanders, 45 U.S.L.W. 4209 (1977).

Since there is no subject matter jurisdiction, we will vacate the judgment of the district court on the merits, and remand the case to that court with instructions to dismiss the complaint.

VACATED AND REMANDED



42 USC § 405

(a)****
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(g) Judicial review. Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his

answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) hereof which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) hereof, the court shall



review only the question of conformity with such regulations and the validity of such regulations. The court shall, on motion of the Secretary made before its files its answer, remand the case to the Secretary for further action by the Secretary, and may, at any time, on good cause shown, order additional evidence to be taken before the Secretary, and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only

to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.



42 USC § 418

(a) ****
*
*
*
*

(d) (1) *****

(2) *****

(3) Notwithstanding paragraph (1), an agreement with a State may be made applicable (either in the original agreement or by any modification thereof) to service performed by employees in positions covered by a retirement system (including positions specified in paragraph (4) but not including positions excluded by or pursuant to paragraph (5)), if the governor of the State, or an official of the State designated by him for the purpose, certifies to the Secretary of Health, Education, and Welfare that the following conditions have been met:

(A) A referendum by secret written ballot was held on the question of whether service in positions covered by such retirement system should be excluded from or included under an agreement under this section;

(B) An opportunity to vote in such referendum was given (and was limited) to eligible employees;

(C) Not less than ninety days' notice of such referendum was given to all such employees;

(D) Such referendum was conducted under the supervision of the governor or an agency or individual designated by him; and

(E) A majority of the eligible employees voted in favor of including service in such positions under an agreement under this section.



An employee shall be deemed an "eligible employee" for purposes of any referendum with respect to any retirement system if, at the time such referendum was held, he was in a position covered by such retirement system and was a member of such system, and if he was in such a position at the time notice of such referendum was given as required by clause (C) of the preceding sentence, except that he shall not be deemed an "eligible employee" if, at the time the referendum was held, he was in a position to which the State agreement already applied, or if he was in a position excluded by or pursuant to paragraph (5). No referendum with respect to a retirement system shall be valid for purposes of this paragraph unless held within the two-year period which ends on the date of execution of the agreement or modification which

extends the insurance system established by this title to such retirement system, nor shall any referendum with respect to a retirement system be valid for purposes of this paragraph if held less than one year after the last previous referendum held with respect to such retirement system.



42 USC § 418

(a)*****
*
*
*
*

(g) Termination of agreement. (1) Upon giving at least two years' advance notice in writing to the Secretary of Health, Education, and Welfare, a State may terminate, effective at the end of a calendar quarter specified in the notice, its agreement with the Secretary either—

(A) in its entirety, but only if the agreement has been in effect from its effective date for not less than five years prior to the receipt of such notice; or

(B) with respect to any coverage group designated by the State, but only if the agreement has been in effect with respect to such coverage group for not less than five years prior to the receipt of such notice.

No. 77-880

# In the Supreme Court of the United States

OCTOBER TERM, 1977

THOMAS D. LOWTHER, ET AL., PETITIONERS

*v.*

STATE OF MARYLAND EMPLOYEES RETIREMENT SYSTEM, ETC., ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

# In the Supreme Court of the United States

OCTOBER TERM, 1977

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No. 77-880

THOMAS D. LOWTHER, ET AL., PETITIONERS

*v.*

STATE OF MARYLAND EMPLOYEES RETIREMENT SYSTEM, ETC., ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

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**MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION**

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1. This case was brought by Montgomery County, Maryland, on behalf of its police officers, and by one of those officers individually and as President of the Police Association of Montgomery County, seeking termination of Social Security coverage for Montgomery County police.

Under 42 U.S.C. 418(a), the Secretary of Health, Education, and Welfare is authorized to enter into an agreement with any state for the purpose of extending Social Security coverage to state and local governmental employees. After such an agreement has been in effect for five years, the state may terminate that agreement "with respect to any coverage group designated by the State" by giving written notification two years in advance of termination. 42 U.S.C. 418(g)(1)(B).

In 1971 the police of Montgomery County voted to terminate their Social Security coverage (Pet. App. A-5). The state administrative office sought the advice of the Regional Commissioner of Social Security, who expressed the opinion that all of the employees of Montgomery County could withdraw from the program but that the police could not withdraw alone (Pet. App. A-5 to A-6). After further informal meetings, the Montgomery County Personnel Director sent a letter denominated an "appeal" to the state Social Security Administrator, who forwarded it to the Social Security Administration (Pet. App. A-6). The Commissioner of Social Security subsequently ruled, in agreement with the earlier opinion of the Regional Commissioner, that the Montgomery County police by themselves could not withdraw from the program (*ibid.*).

Petitioners then brought this suit in the United States District Court for the District of Maryland, which found jurisdiction for the suit under 28 U.S.C. 1331. Turning to the merits, the court held that the Montgomery County policemen did not constitute a separate "coverage group" for the purpose of terminating coverage (416 F. Supp. 737; App., *infra*, pp. 1a-21a).[1] The district court also concluded that the 1965 election by the police of Social Security coverage is no longer open to challenge.

The court of appeals vacated the judgment of the district court for want of jurisdiction and remanded the case for dismissal of the complaint (561 F. 2d 1120; Pet. App. A-1 to A-14). Relying on *Weinberger* v. *Salfi*, 422 U.S. 749, and *Mathews* v. *Eldridge*, 424 U.S. 319, the

[1]Petitioners have neglected to reproduce the opinion of the district court. See Rule 23(1)(i) of the Rules of this Court. We reproduce that opinion as an Appendix to this memorandum.



court first determined that 28 U.S.C. 1331(a) conferred no jurisdiction over claims arising under Title II of the Social Security Act (Pet. App. A-7 to A-8). The court of appeals then rejected petitioners' attempt to base jurisdiction on 42 U.S.C. 405(g), which authorizes judicial review at the behest of "[a]ny individual, after any final decision of the Secretary made after a hearing to which [the individual] was a party" (Pet. App. A-10), finding no indication that the individual plaintiff in this case had filed a claim or been a party to a hearing (*id.* at A-10 to A-11).[2] Finally, the court held (*id.* at A-13 to A-14) that there was no jurisdiction under 42 U.S.C. 418(t) because the State had not prosecuted the claim of the policemen before the Social Security Administration, as required by that provision.

2. The decision of the court of appeals is correct, does not conflict with any decision of this Court or any court of appeals, and does not warrant further review.

Petitioners first contend (Pet. 16-17) that 42 U.S.C. 418(g)(1)(B) permits a retirement system coverage group to file a request for termination of coverage on behalf of all its members and that "[w]hen this is done, the 'individual' claim requirement of Title 42 U.S.C., Section 405(g) has been met." But nothing in the Social Security Act suggests that the requirement of Section 405(g) can so easily be avoided. Although Section 418(g)(1)(B) does permit termination of a coverage agreement, that

[2]The court observed that the jurisdictional requirement of a final decision by the Secretary after a hearing on a claim by an individual policeman was not necessarily futile, despite the informal decision already reached by the Commissioner of Social Security, because the Secretary may reach a different decision following more complete arguments and an evidentiary hearing. Pet. App. A-12 to A-13.

provision by its terms applies only to termination of a coverage agreement sought *by the State*. Petitioners' statement that the State of Maryland "did everything possible to facilitate the policemen's request for termination" (Pet. 19) is wrong; the State neither exhausted the administrative procedure provided by 42 U.S.C. 418(s) (see 20 C.F.R. 404.1270-404.1274) nor brought suit pursuant to 42 U.S.C. 418(t). See Pet. App. A-13 to A-14. The State has not done what the statute requires, and petitioners therefore derive no benefit from Section 418.

Petitioners also suggest (Pet. 5, 17-18) that they need not follow normal review channels because the police have no means to obtain administrative review of their continued coverage. As the court of appeals held (Pet. App. A-10), however, the Act provides a method by which employees may raise the issue of coverage with the Secretary and receive an administrative hearing. Should the police be dissatisfied with the Secretary's decision, they then may seek judicial review.[3] 42 U.S.C. 405(c)(4)-(8), (g). See 20 C.F.R. 404.803, 404.805, 404.806, 404.810, 404.905(g), 404.907, 404.909, 404.947, 404.951. See also *RoAne* v. *Mathews*, 538 F. 2d 852 (C.A. 9).

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[3]This case therefore does not raise the difficult jurisdictional questions that may be involved when the statute provides no way for any person to seek judicial review under Section 405, and it does not present any question concerning the appropriateness of class relief when only one person satisfies the jurisdictional requirement of the statute. Some of these questions are presented in *Califano* v. *Aznavorian*, appeal pending, No. 77-991; others have been the subject of repeated litigation in the courts of appeals. See, *e.g.*, *Liberty Alliance of the Blind* v. *Califano*, C.A. 3, No. 77-1010, decided December 6, 1977 (class of those who have filed claims may be certified because all members satisfy the statutory requirement); *Elliott* v. *Weinberger*, 564 F. 2d 1219 (C.A. 9) (if no statute provides for a hearing, courts have jurisdiction despite Section 405(g)); *Jimenez* v. *Weinberger*, 523 F. 2d 689 (C.A. 7), certiorari denied, 427 U.S. 912 (class of all potential claimants may be certified if at least one has satisfied jurisdictional requirements). These questions should be reviewed by this Court in an appropriate case, but the ready availability of review under Section 405 of the police officers' contention means that the present case is squarely controlled by *Salfi*.



It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
*Solicitor General.*

MARCH 1978.

DOJ-1978-02

# APPENDIX

MONTGOMERY COUNTY, MARYLAND, PLAINTIFF

*v.*

ROBERT M. BALL, COMMISSIONER OF SOCIAL SECURITY, ET AL., DEFENDANTS.

THOMAS D. LOWTHER AND THOMAS D. LOWTHER, PRESIDENT, POLICE ASSOCIATION OF MONTGOMERY COUNTY, MARYLAND, INC., PLAINTIFFS,

*v.*

MONTGOMERY COUNTY, MARYLAND, ET AL., DEFENDANTS.

Civ. Nos. 73-661-H and H-74-530.

UNITED STATES DISTRICT COURT, D. MARYLAND.

Dec. 17, 1975.

ALEXANDER HARVEY, II, District Judge:

These two cases raise questions concerning statutory provisions which extend coverage of the Social Security Act to state and local governmental employees. By Order of this Court, these cases have been consolidated for all purposes pursuant to Rule 42(a) of the Federal Rules of Civil Procedure.

In Civil No. 73-661-H, Montgomery County, Maryland sues on behalf of its police officers,[1] while in Civil No. H-74-530, the President of the Police Association of that County brings suit on behalf of the Association and of the members of the County Police

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[1]There are 784 policemen employed by Montgomery County.

Department.[2] The consolidated amended complaint seeks a declaratory judgment providing that Montgomery County policemen are not within the coverage provided by Title II of the Social Security Act and injunctive relief compelling the Social Security Administration to terminate such coverage for the police officers retroactive to June 30, 1973. Named as defendants in such complaint are the Commissioner of Social Security, the Secretary of the Department of Health, Education and Welfare (hereinafter "the Secretary") and the Employees Retirement System of the State of Maryland. Jurisdiction has been asserted under 28 U.S.C. §1331(a), under 42 §405(g) and under 5 U.S.C. §§701, *et seq.*[3]

Section 218(a) of the Social Security Act, as amended, 42 U.S.C. §418(a),[4] authorizes the Secretary to enter into an agreement with any state for the purpose of extending Social Security coverage to state and local governmental employees. After such an agreement has been in effect for five years, the state, pursuant to Section 218(g)(1)(B), may terminate that agreement "with respect to any coverage group designated by the State" by giving written notification two years in advance of termination.

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[2]Montgomery County was named as a defendant in Civil No. H-74-530. However, when these cases were consolidated, the County was realigned as a plaintiff in the consolidated case.

[3]In denying defendants' motion to dismiss, this Court previously ruled that subject matter jurisdiction exists under 28 U.S.C. §1331(a).

[4]Reference will be made to sections of the Social Security Act rather than to Title 42 of the United States Code. The Code citation to that Title may be determined by adding 200 to the section numbers of the Act.



In 1951, the State of Maryland and the Secretary's predecessor, the Federal Security Administrator, executed an agreement under Section 218(a) "for the purpose of extending the old age and survivors' insurance system established by Title II of the Social Security Act . . . to services performed by individuals employed by political subdivisions of the State of Maryland." By 1958, this coverage included all employees of Montgomery County except police officers and elected officials. The police officers, as members of the Montgomery County Police Relief and Retirement Fund, were excluded from Social Security coverage by Section 218(d) of the Act, which provides that an agreement with a state may not include those governmental employees covered by a retirement system. However, Section 218(d)(3) permits the extension of coverage to governmental employees covered by a retirement system provided that a referendum is held and a majority of the eligible employees vote in favor of such coverage.

On April 5, 1965, Montgomery County police officers held such a referendum and voted in favor of being included within the outstanding agreement with the State of Maryland. Accordingly, the Chief of the Division of Social Security, Board of Trustees of the Employees Retirement System of the State of Maryland (hereinafter "the State Administrative Officer"), who is the state official empowered to seek modification of the agreement with the Secretary,[5] was notified by Montgomery County of the referendum vote. Social Security coverage for County police officers then became effective on May 30, 1965. However, as a result of an oversight, the agreement formally extending coverage to these policemen was not

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[5]The relevant provisions of State law are to be found in Section 39 of Article 73B of the Annotated Code of Maryland.

reduced to writing until almost seven years later when on January 11, 1972, Modification No. 200 to the Maryland Federal-State Agreement was signed by the appropriate federal and state officials.

On April 2, 1971, approximately six years after the coverage in question had become effective, Montgomery County policemen conducted another referendum and on this occasion voted to withdraw from Social Security coverage. The Montgomery County Council then formally notified the State Administrative Officer of the County's desire to terminate Social Security coverage for its policemen pursuant to Section 218(g)(1). The State Administrative Officer thereupon referred this request to the Regional Commissioner for the Social Security Administration.

Concluding that Montgomery County police officers did not constitute a separate "coverage group" under Section 218(g)(1)(B) of the Act, the Regional Commissioner denied this request for the termination of coverage. The State Administrative Officer thereupon filed an administrative appeal with the Social Security Administration. On February 2, 1973, the Commissioner of Social Security took action which in effect denied the State's appeal and affirmed the previous determination that the relevant coverage group for the purposes of terminating coverage was composed of all employees of Montgomery County and not merely of policemen. This civil action was thereafter filed.

In asking this Court to order the defendants to terminate Social Security coverage for Montgomery County police officers, plaintiffs advance several different arguments. First, plaintiffs assert that no valid agreement ever existed for extending Social Security coverage to Montgomery County policemen because the 1965



referendum did not comply with the requirements of Section 218(d)(3) of the Act. Secondly, plaintiffs contend that the Secretary is estopped from declining to terminate Social Security coverage for County policemen because the agreement between the Secretary and the State relating to such coverage was the result of material misrepresentations and should be rescinded or reformed by this Court. Thirdly, plaintiffs argue that Section 218 of the Act on its face should be construed to permit County police officers to constitute a separate coverage group for purposes of the termination of coverage. Finally, plaintiffs challenge the constitutionality of Section 218 on due process and equal protection grounds.

Besides opposing these contentions on their merits, the federal defendants have renewed their objections to plaintiffs' standing to bring this suit and to this Court's jurisdiction. In support of their argument as to jurisdiction, the federal defendants rely on the Supreme Court's recent opinion in *Weinberger* v. *Salfi*, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed. 2d 522, 43 U.S.L.W. 4985 (1975), which held that Section 205(h) of the Social Security Act precludes federal question jurisdiction in cases arising under Title II of the Act. However, in view of this Court's determinations following trial concerning the merits of this case, it is not necessary to re-examine in the light of the *Salfi* case the Court's previous ruling that it has subject matter jurisdiction.

*Validity of the Original Referendum*

Social Security coverage under a federal-state agreement may be extended to governmental employees in positions covered by a retirement system only in accordance with the referendum procedures established by

Section 218(d)(3). This Subsection provides in pertinent part as follows:

> No referendum with respect to a retirement system shall be valid for purposes of this paragraph unless held within the two-year period which ends on the date of execution of the agreement or modification which extends the insurance system established by this subchapter to such retirement system . . .

Relying upon this provision and in particular the word "execution", plaintiffs contend that no valid referendum was ever held under the Act because no written agreement extending Social Security coverage to County police officers was executed within the two years following the 1965 referendum. Pointing out that the written aggreement in question was not signed until January 11, 1972 when Modification No. 200 was executed, plaintiffs contend that the 1965 referendum was invalid, that the County police officers were never properly included within Social Security coverage and that the 1972 written agreement is null and void.

But plaintiffs blink at obvious facts when they assert that no agreement existed before Modification No. 200 was executed in 1972. Plaintiffs argue that the word "execution" in Section 218 (d)(3) connotes a written and signed agreement and that Congress intended that the parties would be bound only if such an agreement existed. This Court would disagree.

Unlike Section 218(g)(1) which explicitly requires notification "in writing for termination of a federal-state agreement, section 218(d)(3) does no more than require that an agreement be put into effect within a two-year period after the referendum, if insurance coverage is to be extended to the coverage group in question. The legislative history of Section 218(d)(3) indicates that Con-



gress imposed this two-year limitation to insure that, following a favorable referendum, state officials would act promptly to effectuate coverage for the appropriate employees. *See* Hearings on H.R. 7199 Before the House Comm. on Ways and Means, 83d Cong., 2d Sess. 396 (1954). Section 218(d)(3) is thus concerned with the time within which government officials must act to accomplish the extension of the coverage and not with the fixing of any precondition for the existence of any agreement at all. A statute must be construed to effectuate the apparent purpose and intention of Congress. *Crosse & Blackwell Co.* v. *F.T.C.*, 262 F. 2d 600, 605-606 (4th Cir. 1959). In this case, the parties acted promptly, and the agreement was put into effect at once, even though no formal writing was executed until some years later. The evidence indicates that the failure of the parties to sign a written agreement was the result of an administrative oversight which did not affect performance by the parties of the agreement.

Moreover, the language of Section 218(d)(3) on its face does not require that a written agreement be signed within the two-year period for coverage to be effective. Absent a statutory definition or some other contrary indication, the words of a statute are to be accorded their ordinary meaning. *See Caminetti* v. *United States*, 242 U.S. 470, 485-86, 37 S.Ct. 192, 61 L.Ed. 442 (1917); *United States* v. *Hunter*, 459 F. 2d 205, 210 (4th Cir.), *cert. denied*, 409 U.S. 934, 93 S.Ct. 235, 34 L.Ed. 2d 189 (1972). "To execute" may properly be construed to mean "to put into effect" or "to carry out fully and completely", and when referring to a legal instrument, may mean "to complete" or "to perform what is required to give validity to."

*Webster's Third New International Dictionary* (1967).[6] Reducing an agreement to writing is undoubtedly one way of completing or giving validity to an agreement, but it is not the only way. The essential question under the statutory language here is whether the parties have performed all that is necessary to give validity to their agreement. Elementary principles of contract law show that, depending upon the intention of the parties, an agreement may be valid and complete before being reduced to a formal document. 1 Corbin on *Contracts*, § 30 at 98-99 (1963).

In *Krawill Machinery Corp.* v. *Robert S. Herd Co.*, 145 F. Supp. 554, 561 (D.Md. 1956), *aff'd and remanded on other grounds*, 256 F. 2d 946 (4th Cir. 1958), *aff'd*, 359 U.S. 297, 79 S.Ct. 766, 3 L.Ed. 2d 830 (1959), Judge Thomsen, finding the existence of a contract based on mutual intentions, relied upon Section 26 of the *Restatement of Contracts,* which provides as follows:

> Mutual manifestations of assent that are in themselves sufficient to make a contract will not be prevented from so operating by the mere fact that the parties also manifest an intention to prepare and adopt a written memorial therof . . .

*Accord, Atlantic Banana Co.* v. *Standard Fruit & Steamship Co.*, 493 F. 2d 555, 558 (5th Cir. 1974); *Banking & Trading Corp.* v. *Floete*, 257 F. 2d 765, 769 (2d Cir. 1958); *Smith* v. *Onyx Oil & Chemical Co.*, 218 F. 2d 104, 108 (3d Cir. 1955).

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[6]As one example of what amount to an execution of an agreement, *Webster's Third New International Dictionary* refers to the "signing and perhaps sealing and delivering" of the documents. Quite obviously, many other acts would also fit within the more general meaning given.



Despite the delayed execution of modification No. 200, the record in this case is replete with "mutual manifestations of assent" establishing that the parties agreed to extend Social Security coverage to County police officers in 1965 and that both sides in fact have performed under such agreement since May 30, 1965. The County police officers affirmatively voted for Title II coverage; the County Council passed a resolution approving such coverage; the County and the State have been reporting the wages of the police officers to the Social Security Administration since the second quarter of the calendar year 1965, and the Administration has continuously provided credited quarters of coverage with respect to such wages. Furthermore, beginning in 1967, County police officers and their families have been receiving the full range of benefits under Title II of the Act. Finally, the County police officers held a referendum seeking to withdraw coverage, thereby recognizing the existence of the agreement. Such conduct over a period of six years or more clearly establishes that an agreement for Social Security coverage of Montgomery County police officers existed long before January 11, 1972, when Modification No. 200 was executed. The circumstances here show that formal execution of the modification did no more than memorialize the parties' prior agreement. *See generally* 1 Corbin on Contracts, § 30 at 102-109 (1963).

For these reasons, this Court holds that within the meaning of Section 218(d)(3), the 1965 referendum was a valid one because it was held less than two years before the "execution" or putting into effect of the agreement extending Social Security coverage to police officers of Montgomery County.

*Estoppel and Mistake*

Plaintiffs next challenge the validity and effect of the coverage, agreement on the grounds of mistake and misrepresentation of material facts. Before the 1965 referendum was held, County police officers sought information from both federal and state officials concerning the procedure whereby they might at a later date withdraw from coverage if in fact they voted to be included in the system. From the evidence, it appears that the State Administrative Officer, then one Paul H. Fales, did inform members of the Montgomery County Police Relief and Retirement Fund before the 1965 referendum that they would constitute a separate "coverage group" for purposes of terminating the agreement with the Secretary pursuant to Section 218(g)(1)B). However, the evidence in this case does not establish that such an affirmative representation was ever made by officials of the Social Security Administration. This Court finds that the federal officials did no more than inform County police officers of the statutory scheme for termination without expressly committing themselves as to whether County policemen constituted a coverage group.

Plaintiffs rely on the stipulated testimony of John A. Bechtel, who was President of the Police Association at the time of the 1965 referendum. According to Bechtel, a meeting was held on February 9, 1965, attended by members of the Association and by Charles M. Sylvester, then District Manager of the Social Security office for the District which included Montgomery County. Bechtel's testimony is to effect that Sylvester, after telling the police officers that they could terminate their coverage after it had been extended, agreed to confirm his statement in writing. However, Sylvester could remember no such



meeting,[7] and the letter in evidence from Sylvester to Bechtel did no more than outline the statutory requirements for termination and did not purport to define the term "coverage group".[8] The evidence is thus not sufficient to establish that federal officials made affirmative misrepresentations at the time the 1965 referendum was held.

In any event, even if the representations relied upon were made, defendants would still not be estopped from asserting the defenses they have raised in this suit. A government agency cannot be held responsible for the erroneous statements and representations made by its agents. *See Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 384-85, 68 S.Ct. 1, 92 L.Ed. 10 (1947); *United States* v. *Davenport*, 297 F. 2d 284, 285 (4th Cir. 1961); *United States* v. *Woodland Terrace, Inc.*, 293 F. 2d 505, 509 (4th Cir.), *cert. denied*, 368 U.S. 940, 82 S.Ct. 381, 7 L.Ed. 2d 338 (1961); *Northeast Community Organization, Inc.* v. *Weinberger*, 378 F. Supp. 1287 (D.Md.1974); *Feil* v. *Gardner*, 281 F. Supp. 983, 985 (E.D.Wis.), *aff'd*, 402 F. 2d 481 (7th Cir. 1968).

Plaintiffs contend that this doctrine has been eroded by decisions handed down in recent years. In particular, plaintiffs rely on an opinion of the Ninth Circuit which observed that "estoppel is available . . . against the government if the government's wrongful conduct threatens to work a serious injustice and if the public's

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[7]Sylvester's deposition was taken before trial and, by agreement of the parties, was included as a part of the record in this case.

[8]This was a letter dated February 11, 1965 from Sylvester to Bechtel discussing conditions under which Social Security coverage for State employees could be terminated. (Plaintiffs' Exhibit No. 27).

interest would not be unduly damaged by the imposition of estoppel." *United States* v. *Lazy FC Ranch*, 481 F. 2d 985, 989 (9th Cir. 1973). Even if such a standard were to be applied in the Fourth Circuit, this Court is satisfied that the circumstances of this case would not warrant a finding that estoppel should be here imposed.[9] The plaintiffs in this case have failed to establish that they have suffered and will suffer serious injustice if denied the right to withdraw from Social Security coverage.

For these reasons, plaintiffs are not entitled to relief in this case because of any statements and representations made by state and federal officials in 1965.[10]

*Interpretation of the Statute*

The contention most vigorously pressed by plaintiffs concerns the Secretary's interpretation of Section 218 insofar as this statute establishes a procedure for terminating Social Security coverage of a particular group under an existing state-federal agreement. Specifically, plaintiffs challenge the administrative interpretation of the term "coverage group" as used in Section 218(g)(1)(B). The pertinent provisions of the Subsection in question, entitled "Termination of agreement", are as follows:

> Upon giving at least two years' advance notice in writing to the Secretary [of Health, Education and

[9]The equivocal nature of the alleged misrepresentation by *an agent of the federal defendants* may also preclude imposition of the doctrine of estoppel. *See generally* 2 Corbin on *Contracts*, § 201 (1963).

[10]The cases cited by plaintiffs in their briefs pertaining to estoppel, mistake and rescission of agreements between private parties are not relevant. As Justice Frankfurter observed in *Federal Crop Insurance Corp.*, "[i]t is too late in the day to urge that the Government is just another private litigant . . ." 332 U.S. at 383, 68 S.Ct. at 3.



> Welfare], a State may terminate, effective at the end of a calendar quarter specified in the notice, its agreement with the Secretary * * *
>
> (B) with respect to any coverage group designated by the State, but only if the agreement has been in effect with respect to such coverage group for not less than five years prior to the receipt of such notice.

The Secretary has taken the position that the appropriate coverage group for termination is determined by reference to the employer entity itself, that is the state or political subdivision involved. In support of such interpretation, the Secretary relies on Section 218(b)(5) which, in part, defines the term "coverage group" as follows: "(B) employees of a political subdivision of a State other than those engaged in performing service in connection with a proprietary function; * * *"[11] The Secretary thus contends that the appropriate coverage group for termination of coverage in this instance is an entity comprising all employees of Montgomery County. On the basis of such an interpretation, the Secretary has not permitted County police officers, as a separate group, to withdraw from the Social Security coverage which has been afforded since 1965.

On the other hand, plaintiffs rely on Section 218(d)(4), which they claim indicates that a retirement system such as the Montgomery County Police Relief and Retirement Fund constitutes a separate coverage group for purposes

[11]Other definitions of "coverage group" contained in Section 218(b)(5) are not pertinent to the circumstances of this case. Montgomery County police officers perform a non-proprietary function, and it does not appear from the record here the Social Security coverage has been extended in the County to employees performing a proprietary function. Thus, Subsection (D) of Section 218(b)(5) is not applicable in this case.

of termination of coverage. Pertinent provisions of Section 218(d)(4) are as follows:

> (4) For the purposes of subsection (c) of this section, the following employees shall be deemed to be separate coverage group—
>
> (A) all employees in positions which were covered by the same retirement system on the date the agreement was made applicable to such system (other than employees to whose services the agreement already applied on such date);
>
> (B) all employees in positions which became covered by such system at any time after such date; and
>
> (C) all employees in positions which were covered by such system at any time before such date and to whose services the insurance system established by this subchapter has not been extended before such date because the positions were covered by such retirement system (including employees to whose services the agreement was not applicable on such date because such services were excluded pursuant to subsection (c)(3)(B) of this section).

But other terms of Section 218 show that plaintiff's position lacks merit. It is of course correct that Section 218(d)(4) provides that employees within such a retirement system "shall be deemed to be a separate coverage group." However, plaintiffs have failed to note the limited scope of this provision, which applies only "[f]or the purposes of subsection (c) of this section * * *"

Subsection (c) describes those services which may be included or excluded within a designated coverage group under a state-federal agreement. This Subsection, *inter alia* permits the state to request that employees covered by



a retirement system be excluded from a particular coverage group and that an agreement be modified to include a coverage group to which the agreement did not previously apply. *See* Section 218(c)(3) and (4). The language of Section 218(d)(4), which is applicable only to Subsection (c), thus makes a retirement system a separate coverage group solely for the purpose of having group originally excluded from a state-federal agreement or thereafter joined as a part of an existing agreement. However, it is Subsection (g) of Section 218 which governs the termination of any agreement by a state for any coverage group.

Thus, the members of a retirement system constitute a separate coverage group under Section 218(d) for purposes of *commencing* Social Security coverage (after initial exclusion) under the referendum procedures set forth in Section 218(d)(3), but not for the purposes of *terminating* their coverage under the procedures set forth in Section 218(g). Nowhere in the statute is there any language suggesting that once such a group has joined other County employees in the coverage provided under a state-federal agreement it may continue to maintain its separate identity for purposes of termination of coverage. The provisions of Section 218(b)(5) which define "coverage group" apply generally to all of Section 218.[12] As Section 218(g) is silent as to the definition of a "coverage group" for purposes of termination, the general provisions of Section 218(b)(5) must control. Section 218(d)(4), relied upon by plaintiffs, in fact supports this interpretation. The definition contained there applies only "[f]or the purposes of Section 218(c)", indicating that the definition of "coverage group" contained in Section 218(b)(5) will be controlling for all other purposes, including Section 218(g).

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[12]The language used in Section 218(b) is that the definitions are "[f]or the purposes of this section—", that is, Section 218 in its entirety.

Moreover, the record here indicates that since 1963 the Secretary has consistently construed Section 218 as prohibiting members of a retirement system like policemen from terminating coverage as a separate group.[13] When presented with questions of statutory construction, a court should show "great deference to the interpretation given the statute by the officers or agency charged with its administration." *Udall* v. *Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.ED 2d 616 (1965). Of course, a court need not "defer to an administrative construction of a statute where there are 'compelling indications that it is wrong.'" *Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86, 94, 94 S.Ct. 334, 339, 38 L.Ed. 2d 287 (1973). Moreover, a court should accord no weight to an agency interpretation that is not "consistent with the congressional purpose." *Morton* v. *Ruiz*, 415 U.S. 199, 236, 94 S.Ct. 1055, 1075, 39 L.Ed. 2d 270 (1974).

Applying these standards, this Court concludes that the Secretary's longstanding interpretation of Section 218(g)(1)(B) is correct. Apart from the statutory distinction between proprietary and non-proprietary services, a "coverage group" under Section 218(b)(5)(B) means quite simply the "employees of a political subdivision." Such language may reasonably be construed, as the Secretary has done, to include all employees of a political subdivision. Administrative efficiency would obviously be enhanced if the political subdivision itself were treated as

[13]Regulations of the Secretary dealing with identification numbers for a coverage group suggest such an interpretation. 20 C.F.R. §404.1240(b). Such Regulations provides in pertinent part: "The term 'coverage group', as used in this section, means a 'coverage group' as defined in section 218(b)(5) of the act, and shall not include a 'coverage group' as defined in section 218(d)(4) of the act." The Regulations have included this language since 1955.



the controlling entity and if various sub-groups within such subdivision were not permitted to terminate coverage by separate action. Where an agency interpretation is a reasonable one, a court should repsect the administrative expertise and not substitute its own views. *Udall* v. *Tallman, supra,* 380 U.S. at 16, 85 S.Ct. 792; *Jno. McCall Coal Co.* v. *United States*, 374 F. 2d 689, 692 (4th Cir. 1967).

The question presented here first came to the attention of the Secretary in 1963. In that year, policemen in West Des Moines, Iowa were denied the right to terminate Social Security coverage for their particular group. On that occasion, the Secretary took the position that once coverage was effective under a state-federal agreement, coverage could be terminated only as to all employees of the political subdivision in question. Exhibits in this case show that the Secretary has consistently adhered to this position.[14] These exhibits, comprising letters and memoranda over the years since 1963, reflect the strength and consistency of the Secretary's position.[15] In *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 472-73, 35 S.Ct. 309. 313. 59 L.Ed. 673 (1914), the Court, relying "on the

[14]Had representatives of the County Police Association checked with proper officials at the Department of Health, Education & Welfare in 1965, they would have learned of the Secretary's position on this issue *before* the original referendum was held. The Secretary's position was clearly stated in various documents in the Department's files.

[15]In its brief, Montgomery County concedes "that Federal Defendant has over the years administratively taken the position that under Section [218(g)] only 'absolute coverage groups' may terminate their social security coverage. This administrative policy in interpreting section [218(g)] has effectively stymied attempts by policemen or firemen to withdraw from social security."

presumption that unauthorized acts would have been allowed to be so often repeated as to crystallize into a regular practice," determined that a long-standing administrative interpretation tends to establish its own validity *Accord, Chemehuevi Tribe of Indians* v. *Federal Power Commission*, 420 U.S. 395, 409-410, 95 S.Ct. 1066, 43 L.Ed. 2d 279 (1975); *Udall* v. *Tallman*, 380 U.S. at 17, 85 S.Ct. 792.

Furthermore, it appears that the Secretary's interpretation of Section 218(g)(1)(B) derives support from Congressional silence. The record shows that Congress has been aware of the position taken by the Secretary and of the criticisms of such positions.[16] Yet, Congress has taken no action to amend the Act. On the contrary, an amendment included by Senator Tunney in Section 218(g)(1), which would have permitted separate groups of policemen and firemen to terminate their coverage, was deleted, in conference, from the Social Security Amendments of 1972. *See* H.R. Regs. No. 1605, 92 Cong., 2d Sess. 43, (1972); U.S. Code Cong. & Admin. News 1972, p. 498 (Defendants' Exhibit 45). Such inaction on the part of Congress is some indication of Congressional approval of the interpretation accorded Section 218(g)(1)(B) by the Secretary. *See Chemehuevi Tribe of Indians* v. *Federal Power Commission, supra*, 420 U.S. at 410, 95 S.Ct. 1066.

For these reasons, this Court holds that Montgomery County police officers do not constitute a separate coverage group for the purpose of terminating Social

[16]Correspondence between the Department of HEW and individual Congressmen show such awareness. Additionally, Senator Tunney brought the contrary position taken by policemen and firemen to the attention of the Senator in a speech before that body on June 15, 1972 118 Cong. Rec. 20993-94 (1972).



Security coverage pursuant to Section 218(g)(1)(B) of the Social Security Act.

*Constitutionality of the Statute*

As their final point, plaintiffs advance several constitutional arguments which do not merit extended discussion. Focusing on the words "coverage groups", plaintiffs first contend that Section 218(g)(1)(B) is unconstitutionally vague. Although conceding that the doctrine of vagueness has been principally confined to statutes proscribing criminal activity, plaintiffs rely on *A. B. Small Co.* v. *American Sugar Refining Co.*, 267 U.S. 233, 239, 45 S.Ct. 295, 69 L.Ed. 589 (1925), for the purpose of extending these constitutional principles to a statute which regulates civil conduct.

In *A. B. Small Co.*, the Court rejected a statutory defense to an action for breach of contract because the statute in question was unconstitutionally vague[17] *Id.* at 238-40, 242, 45 S.Ct. 295. Recent cases indicate that statutes regulating civil conduct have on occasion been held to be subject to the doctrine of vagueness. *See, e. g., Boutilier* v. *Immigration and Naturalization Service*, 3-7 U.S. 118, 123, 87 S.Ct. 1563, 18 L.Ed. 2d 661 (1967) (rejecting vagueness on the merits). However, the circumstances warranting application of this doctrine where civil conduct is involved have been quite limited. *In Marin* v. *University of Puerto Rico*, 377 F. Supp. 613, 626 (D.P.R. 1974), the Court observed that the doctrine of vagueness should be applied to civil enactments "to provide fair warning to those governed by the rule, to

[17]The same statutory provision had previously been declared unconstitutionally vague in a criminal prosecution. *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, 41 S.Ct. 298, 65 L.Ed. 516 (1921).

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

## No. 77-880

THOMAS D. LOWTHER, ET AL.,

*Petitioners,*

v.

STATE OF MARYLAND EMPLOYEES RETIREMENT SYSTEM, ETC., ET AL.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## MEMORANDUM FOR THE STATE RESPONDENTS IN SUPPORT

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## MEMORANDUM FOR THE STATE RESPONDENTS IN SUPPORT

1. These cases were brought by Montgomery County, Maryland, on behalf of its police officers, and by one of those officers individually and as President of the Police Association of Montgomery County, seeking a declaration that Social Security coverage for Montgomery County police officers could be terminated.

States are permitted to enter into agreements with the Secretary of Health, Education, and Welfare to extend Social Security coverage to employees of state and local governments under the provisions of 42 U.S.C. § 418(a).

A state may terminate such an agreement with respect to any coverage group designated by the state, after five years participation, by giving written notice two years in advance of the termination in accordance with 42 U.S.C. § 418(g)(1)(B).

In 1965, Montgomery County police officers held a referendum and voted in favor of being included in the agreement between the State of Maryland and the Secretary of Health, Education, and Welfare. Social Security coverage for County police officers became effective on May 30, 1965, although an agreement formally extending coverage was not reduced to writing until 1972 (416 F. Supp. 740; Fed. Res. App. 3a to 4a). In April, 1971, another referendum was conducted in which the Montgomery County police officers voted to withdraw from Social Security coverage. The Montgomery County Council informed the State Administrative Officer by a written request to terminate police officer coverage pursuant to 42 U.S.C. § 418(g)(1). The Administrative Officer forwarded this request to the Social Security Administration Regional Commissioner (*Id.* at 740; Fed. Res. App. 4a).

The Regional Commissioner denied this request. The Administrative Officer filed an administrative appeal with the Social Security Commission and, on February 2, 1973, the Commissioner of Social Security took action with regard to that appeal which affirmed the previous denial (*Id.* at 740; Fed. Res. App. 4a).

Petitioners thereafter brought this suit in the United States District Court for the District of Maryland. The District Court held that it had jurisdiction and determined, on the merits, that Montgomery County policemen did not constitute a "coverage group" for the purpose of terminating coverage (*Id.* at 737; Fed. Res. App. 1a-21a). The Court of Appeals vacated the judgment of the district court and remanded the case



for dismissal for want of jurisdiction (561 F.2d 1120; Pet. App. A-1 to A-14). The court held that there was no jurisdiction to present the claim of the policemen to the Social Security Administration since the State had failed to do so.

The decision of the Court of Appeals was inconsistent with the evidence in the record and decision of the District Court Judge in that no request for termination proceeding had been established by the Secretary of Health, Education, and Welfare, and therefore, there was no administrative remedy available.

The evidence presented to the District Court was absolutely clear. A request for termination was made and a final decision was made with respect to that request. The Regional Commissioner, Mr. Dewberry, testified that this request was made, that it was the first request for termination he had ever received in his career and that there was no formal procedure, requirement or format for requesting termination (Dewberry Depo. 65, 67, 69, 77, 78). He further testified that the Secretary of Health, Education, and Welfare denied that request (Dewberry Depo. 79).

The Federal Defendants have asserted, at trial and on appeal, that a proceeding under 42 U.S.C. § 418(s) must be instituted by the State and that, thereafter, the only available jurisdictional base is 42 U.S.C. § 418(t). The Court of Appeals agreed with this contention and so held (561 F.2d 1122; Pet. App. A13 to A14). However, 42 U.S.C. § 418(s) appears to only apply to review of assessments, denials of claims for credits or refunds, or allowances of claims.* The District Court ruled that this section was inapplicable to the instant case (Joint Record Extract E. 25). The Federal Defendants read this section much more broadly than it was applied prior to

* 42 U.S.C. § 418(s) and (t) are set out in full as an Appendix to this Memorandum.

the filing of this suit. The District Court ruled that a final decision on the question of the ability of the Montgomery County policemen to withdraw had been rendered by the Secretary (Joint Record Extract E. 28).

The State Defendants concur with the Petitioners' assertion that the written opinion of the Commissioner denying relief constituted a "final decision" under the principles set out by this Court in *Weinberger v. Salfi*, 422 U.S. 749 (1975) and *Matthews v. Eldridge*, 424 U.S. 319 (1976), and that the District Court did not err in exercising subject matter jurisdiction.

It is therefore respectfully submitted that a Writ of Certiorari should issue to review the judgment of the Fourth Circuit Court of Appeals.

Respectfully submitted,

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April 1978



## APPENDIX

42 U.S.C. § 418

(a) * * *

* * * * * * *

(s) Where the Secretary has made an assessment of an amount due by a State under an agreement pursuant to this section, disallowed a State's claim for a credit or refund of an overpayment under such agreement, or allowed a State a credit or refund of an overpayment under such agreement, he shall review such assessment, disallowance, or allowance if a written request for such review is filed with him by the State within 90 days (or within such further time as he may allow) after notification to the State of such assessment, disallowance, or allowance. On the basis of the evidence obtained by or submitted to the Secretary, he shall render a decision affirming, modifying or reversing such assessment, disallowance, or allowance. In notifying the State of his decision, the Secretary shall state the basis therefor.

(t) (1) Notwithstanding any other provision of this title any State, irrespective of the amount in controversy, may file, within two years after the mailing to such State of the notice of any decision by the Secretary pursuant to subsection (s) affecting such State, or within such further time as the Secretary may allow, is civil action for a redetermination of the correctness of the assessment of the amount due, the disallowance of the claim for a refund or credit, or the allowance of the refund or credit, as the case may be, with respect to which the Secretary has rendered such decision. Such action shall be brought in the district court of the United States for the judicial district in which is located the capital of such State, or, if such action is brought by an instrumentality of two or more States, the principal office of such instrumentality. The judgment of the court shall be final, except that it shall be subject to review in the same manner as judgments of such court in other civil

actions. Any action filed under this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

(2) Notwithstanding the provisions of section 2411 of title 28, United States Code [28 U.S.C.S. § 2411], no interest shall accrue to a State after final judgment with respect to a credit or refund of an overpayment made under an agreement pursuant to this section.

(3) The first sentence of section 2414 of title 28, United States Code [28 U.S.C.S. § 2414], shall not apply to final judgments rendered by district courts of the United States in civil actions filed under this subsection. In such cases, the payment of amounts due to States pursuant to such final judgments shall be adjusted in accordance with the provisions of this section and with regulations promulgated by the Secretary.